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Supreme Court of the United States

October Term, 1949 — Nos. 255, 256, 257, 258

GUS HALL,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

HENRY WINSTON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

THE UNITED STATES OF AMERICA, ex rel. GUS HALL,

Petitioner,

vs.

JAMES MULCAHY, United States Marshal.

THE UNITED STATES OF AMERICA, ex rel. HENRY WINSTON,

Petitioner,

vs.

JAMES MULCAHY, United States Marshal.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petition for Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, Gus Hall and Henry Winston, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit made July 14, 1949 (R. 202),* affirming orders of the District Court for the Southern District of New York, which (a) held petitioners in contempt of court, and (b) dismissed writs of habeas corpus, directed to their imprisonment therefor.

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* Though there were separate records in the *Hall* and *Winston* cases, their pagination is, for our purposes, identical. The habeas corpus record also was separate for each petitioner. Though submitted, no citations are made therefrom.

Statement of the Matter Involved

Petitioners are defendants in *United States* v. *William Z. Foster et al.*, C 128-87, now on trial in the Southern District of New York, before Judge Harold R. Medina. They had each been enlarged on bail of $5,000 following their arrest on return of the indictments July 28, 1948. The indictments were laid under 18 U. S. C. A., Section 10, commonly known as the Smith Act.

On June 3, 1949, Judge Medina, in course of the trial, remanded petitioners "for the remainder of the trial" following a courtroom incident (R. 19). In thus remanding petitioners, the Trial Judge neither found nor certified that any contempt had been committed by them. The only order then made was a bare entry dated June 3, 1949, remanding petitioners to custody of the United States Marshal (R. 51). On June 6th, petitioners obtained writs of habeas corpus from Judge Leibell of the same Court, returnable before him. On June 7th, the writs were heard. On June 8th, the writs still pending, Judge Leibell submitted to Judge Medina this question: "Was the remanding of the defendants, Hall and Winston on June 3, 1949, intended as a form of punishment for any misbehavior on their parts in the presence of the Court, constituting a contempt of court under Tit. 18, U. S. C., Sec. 401(a)?" (R. 114).

Then for the first time (after petitioners had already been remanded and in custody for five days) Judge Medina, in his answer to Judge Leibell's query, assigned contempt as a ground for his action of June 3rd: "My answer is that the remanding of the defendants, Hall and Winston on June 3rd, 1949, was intended, first, as an exercise of my plenary powers to remand the defendants or any of them at any time and as a form of punishment for misbehavior on their parts, constituting a contempt of court under Tit. 18, U. S. C., Sec. 401(a)" (R. 114).

The same day, June 8th, Judge Medina issued judgments and commitments as prescribed by Rule 42(a) of the Rules of Criminal Procedure finding and certifying that petitioners were each guilty of contempt by reason of the occurrence on June 3rd, and directing their "imprisonment for the remainder of the trial" (R. 116).

Judge Leibell thereupon held that these judgments of June 8th superseded the proceedings of June 3rd and accordingly dismissed the writs. Appeals were then taken to the Court of Appeals from both the dismissal of the writs and the judgments of contempt (R. 161). Argument was had June 17th. On July 14th the Court of Appeals unanimously affirmed both determinations. Petitioners have joined their respective petitions for a writ of certiorari pursuant to Rule 48 of the Rules of this Court.

Thereafter, on August 4, 1949, application was made to Judge Medina, pursuant to Federal Rule of Criminal Procedure 35 for a reduction of their sentence to the time then served. After argument, this application was denied without opinion.

Jurisdiction

The Court of Appeal's judgment was entered July 14, 1949 (R. 214). Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U. S. C., Sec. 1254(1).

Opinions Below

Neither the Court of Appeals nor District Judge Leibell's opinion has yet been officially reported. The former appears at R. 202; the latter at R. 132. Judge Medina rendered no opinion.

Statutes and Rules Involved

The following sections of 18 U. S. Code:

"401. Power of Court

A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command.

Rule 42(a) of the Federal Rules of Criminal Procedure:

Criminal Contempt.

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the Court. The order of contempt shall recite the facts and shall be signed by the Judge and entered of record."

Statement of the Case

The case is stated above under the heading "Statement of the Matter Involved".

Questions Presented

(1) Whether the remand action of Judge Medina, taken June 3rd, was lawful and within his authority.

(2) Whether the judgments of June 8th may retroactively cure any defect in the remand action of June 3rd.

(3) Whether the judgments of June 8th may be retroactively effective respecting the remand action of June 3rd since (a) petitioners had already been imprisoned for five days when such judgments were made, and (b) neither in the remand action of June 3rd nor at any time prior to June 8th was contempt of court specified or otherwise suggested as a ground of their imprisonment.

(4) Whether the sentence of imprisonment here imposed, i.e., "for the remainder of the trial", considered in the circumstances of this trial, possesses the definiteness and certainty of duration and character required by law.

(5) Whether such sentence imposes upon petitioners a quality and degree of pressure and compulsion which so curtails the full, free and unobstructed presentation of their defense as to deprive them of their constitutional rights under the Fifth and Sixth Amendments.

Specifications of Error

The Court of Appeals erred in

1. Affirming the orders (a) dismissing the writs of habeas corpus and (b) adjudging petitioners in contempt of court.

2. Failing to hold that petitioners' remand of June 3rd and revocation of their bail on that date were in excess of the Trial Court's authority.

3. Holding that the judgment of June 8, 1949, was retroactively effective to June 3, 1949.

4. Holding that the sentences here imposed were lawfully authorized.

5. Holding that petitioners' sentence and imprisonment were in compliance with the requirements prescribed by Rule 42(a) of the Rules of Criminal Procedure.

Reasons for Allowance of Writ

This petition presents several important questions of federal law decided by the Court of Appeals which have not, but should be, settled by this Court or which were decided in conflict with applicable decisions of this Court. The Court of Appeals has so decided them as to sanction a drastic departure from the accepted and usual course of judicial proceedings and to call for an exercise of this Court's supervisory power. The questions referred to, the decisions thereon and other considerations related thereto are more particularly the following:

1. Was Judge Medina acting within his lawful authority in revoking petitioners' bail on June 3rd and remanding them to custody? We contend that he was not. The Court of Appeals, by reason of its erroneous determination, failed to reach this question. No "plenary" power exists for any such action either to punish for contempt or otherwise. Petitioners' right to bail before conviction, subject to certain exceptions not here applicable, is absolute. Rule of Criminal Procedure 46(a); cf. Advisory Commission Note, 18 U. S. C., Appendix p. 308; *Wright* v. *Henkel,* 190 U. S. 40. The limited power of revocation allowed does not cover this case. *Hood* v. *U. S.,* 23 F. 2d 472; *U. S.* v. *Rice,* 192 Fed. 720. These holdings are rooted in the principle that punishment before conviction is abhorrent to the law

Wright v. *Henkel, supra.* Petitioners' remand on June 3rd was a clear violation of their basic right to bail under Rule 46(a) as thus construed and applied. To sanction such a procedure would subordinate this right to the arbitrary power of a trial judge. No authority has been cited for such a result. The sense of those cited above forbid it.

2. Do the judgments of June 8th validate the remand action of June 3rd? For the reasons stated and the authorities cited in paragraph 1 above, the impressment of a contempt judgment upon the unauthorized revocation of bail five days earlier cannot be said to change the intrinsic character of the action originally taken.

3. Were the judgments of June 8th retroactively effective to June 3rd, so as to make the remand action in effect a judgment for contempt? The Court of Appeals decided they were, erroneously, we contend. Neither the record nor the law applicable thereto sustains such a result. It rather appears here that contempt was an afterthought first suggested in the answer to Judge Leibell's query of June 8th and only then cast into legal judgment form the same day (R. 116). The order previously made June 3rd (R. 51) upon the oral direction in the minutes (R. 19) makes no reference whatever to contempt and certainly cannot be seriously urged as a compliance with Rule of Criminal Procedure 42(a) which requires a factual recital and certification of the contumacious conduct in the Court's presence and entry of an order thereon reciting the same facts. The returns filed in the habeas corpus proceedings allege the order of remand as the reason for detention (R. 56). Nor can these judgments of June 8th be said to comply with Rule of Criminal Procedure 32(a) which requires here that "Sentence shall be imposed without unreasonable delay".

These defects and omissions may not be dismissed as mere irregularities. The safeguards prescribed by Rule 42(a) which they violate, are in consonance with the cau-

tion and scrutiny that this Court has repeatedly applied in reviewing exercises of the contempt power. See *Cooke* v. *U. S.*, 267 U. S. 517, 539; *Nye* v. *U. S.*, 313 U. S. 33, approving dissent by Holmes, J., in *Toledo Newspaper Co.* v. *U. S.*, 247 U. S. 402, 423; *Pendergast* v. *U. S.*, 317 U. S. 412, 420.

4. Was the imprisonment here imposed, i.e., "for the remainder of the trial", a sentence definite and certain as required by law? The Court of Appeals decided it was, erroneously, we contend. The requirement of definiteness in punitive, as distinct from coercive, contempt is well established. *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418; *Wilson* v. *U. S.*, 65 F. 2d 621; *U. S.* v. *Dachis*, 36 F. 2d 601. The contempt sentence "must name a definite period of imprisonment". 13 *Corpus Juris* 85 and cases there cited. This sentence being punitive is not definite according to the intent of the cases just cited.* Its duration depends upon a whole series of factors so imponderable and unpredictable as to deprive it of all lawful and rational relation to the offense for which it was purportedly imposed. The illness of a juror or witness, protracted rebuttal by the Government, the time other co-defendants consume in presentation of their defense, and many other contingencies not difficult to imagine must thus determine the duration of petitioners' imprisonment.

Indeed, by thus making the term of this sentence coextensive with the Government's own rebuttal and cross-examination of the defense witnesses, the Court has, in effect, delegated his judicial sentencing power to the Government prosecutor and has thereby run afoul of this Court's decision in *Tumey* v. *Ohio*, 273 U. S. 510.

Nor is this sentence much different from an imprisonment "until further order of the Court" held to be invalid for want of definiteness in *State ex rel. Grebstein* v. *Lehrman*, 129 So. 818, and *People* v. *Pirfenbrink*, 96 Ill. 68.

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* Neither Government counsel nor we have been able to locate a single prior case in which such a sentence has ever been imposed.

The "indeterminate sentence" cases cited by the Court of Appeals do not alter the above result. There, the mathematical maximum satisfied the requirement of definiteness. Again, unlike here, the indefiniteness was there occasioned by a purpose to rehabilitate, not to punish.

5. Does this sentence compel such a curtailment of the free and unobstructed presentation of petitioners' defense as to be an unconstitutional deprivation under the Fifth and Sixth Amendments? Whether or not intended, the effect of such a sentence is to pressure petitioners, on pain of continued imprisonment, to hurry their defense to a close. Their access to and consultation with counsel and their co-defendants are and have been seriously curtailed. This is particularly so where, as here, petitioners and their co-defendants are on trial for their views and advocacy and opportunity for unobstructed consultation is indispensable to preparation of an effective defense. Thus, this sentence is not only inherently indefinite but its duration is in effect limited upon petitioners' involuntary surrender or, at least, serious impairment of constitutional rights which are indispensable to anyone under trial, as they are, for so serious a crime. We submit that no sentence should be permitted to stand whose duration, aside from its quantitative uncertainty, is conditioned upon consequences of such a character. In the circumstances, we believe that the principle of "undue burden" upon the free exercise of a constitutional right is applicable. *Grosjean* v. *American Press Publishing Co.*, 297 U. S. 233.

Prayer

For the foregoing reasons, your petitioners pray that a writ of certiorari issue out of this Court to the United States Court of Appeals for the Second Circuit to the end that this cause may be reviewed and determined by this Court and that the judgments and decision of the Court of Appeals may be reversed and your petitioners granted such other and further relief as may be just and proper.

Dated, August 11, 1949.

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